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Supreme Court of the United States

OCTOBER TERM, 1930

No. 85

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MUNSON STEAMSHIP LINE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court (Record, pp. 17, 112) is reported in 33 Fed. (2d) 211, and the opinion of the Circuit Court of Appeals (Record, p. 194) is reported in 37 Fed. (2d) 681.

JURISDICTION

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code (U. S. C. 347). Some comments as to the jurisdiction of the District Court are submitted below, but this jurisdiction is not disputed by the Respondent.

THE QUESTION

The question in this case is this:

Is the Munson Line, an independent common carrier by water, required to file, "schedules and tariffs of rates and charges under Section 6 (1) of the Interstate Commerce Act (U. S. C. Title 49, Sec. 6, paragraph 1)," for goods carried by water from Baltimore to Florida ports under its own independent marine bill of lading but received by it (as agent for the owner) from rail carriers to Baltimore under their bills of lading with destination at Baltimore?

Section 6 (1) of the Interstate Commerce Act applies only to "every common carrier subject to the provisions of this Act". The ultimate question, therefore, depends upon the construction and application of Section 1, paragraph 1, of the Interstate Commerce Act (U. S. C., Title 49, Section 1, paragraph 1), reading as follows:

> "1. *Carriers subject to regulation.* The provisions of this chapter shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment."

The Government contends and the Respondent denies that there is a "common arrangement" within the sense of the statute between the rail and water

carrier. Both the lower Courts have found the fact in favor of the Respondent.

With relation to the dominant facts of the case, the question presented may be stated as follows:

Is there a "common arrangement" between the rail and water carrier when—

(1) There is no through bill of lading; no joint or other through or entire rate; no conventional or other division of freight rates; and no contract or agreement whatever, express or implied, between the rail and water carrier with respect to the shipment; and when,

(2) The rail and water carriages constitute separate and distinct contracts, each made directly by the shipper with the carrier, each evidenced and governed solely by the rail and marine bill of lading, issued by the respective carriers directly to the shipper, each bill stating its own freight charge in which the other carrier is in nowise interested, the destination of the goods in the rail bill being Baltimore; and the consignee named therein being the shipper at Baltimore, or the Respondent as agent for the shipper, or the shipper in care of the Respondent.

Merely because—

(3) In the rail bill the shipper makes notation in the space allotted for descriptive marks regarding the goods carried (upon the suggestion of the rail and/or the water carrier—called "cooperation" in the Government's brief), of the name and address of the intended ultimate consignee; but

(4) Such notation on the rail bill is not effective to accomplish further carriage by water from Baltimore without express direct instructions from the shipper to the water carrier in the case of each shipment, although it does facilitate the interchange of the goods at Baltimore by indicating to the rail carrier the convenient particular place of delivery in Baltimore.

The case does *not* involve—

(a) any question of rates—in any form;

(b) the power of the Interstate Commerce Commission to establish joint rail and water rates affecting the commerce involved, under the Panama Canal Act, or otherwise—for the Commission has passed no order of any kind affecting the Respondent;

(c) Any question as to what constitutes interstate commerce;

(d) the immunity of the Respondent from Governmental regulation—for the Respondent is admittedly subject to the Shipping Act and has fully complied therewith by filing maximum rates with the Shipping Board, and otherwise.

The practice and course of business of the Munson Line with respect to this class of transportation does not differ from similar transportation by other water carriers, and there is no novelty in the practice and course of business, which has been in vogue for many years. It has been the common understanding of water carriers (also expressed in decisions of the In-

terstate Commerce Commission and in Federal decisions) that with respect to this class of transportation they are not subject to the provisions of the Interstate Commerce Act.

The case is, therefore, in the nature of a test case, and, if the Government's position is sustained there will necessarily be a revolutionary change affecting this class of water transportation.

The Government's brief, in the statement of the "Question Presented", *assumes* (incorrectly, we submit) that it may be found from the facts of the case that the water traffic involved is "a part of a *continuous shipment not requiring any intervention* by the shipper from the time the goods are delivered to the initial carrier to the time when the water carrier delivers them at destination and when the railroads connecting with the water carrier *co-operate with it* in informing shippers as to notations on the railroad bills of lading *which make possible* such through shipment.". (Italics supplied.)

We dispute the assumption of fact that a continuous or through shipment is made possible by cooperation between the rail and water carrier without requiring intervention by the shipper to effect the water carriage. On the contrary, we maintain (1) that this assumption is not consistent with the findings of fact as made by the lower Courts in this case, and (2) that the facts of the case show that the so-called "coopera-

tion" of the rail carrier is with the shipper rather than with the water carrier, and (3) that the activities of the rail carrier, called "cooperation", do not make possible the continuation of the transportation by water from the port. On the contrary, this is accomplished only by orders from the shipper directly to the water carrier, after the rail carriage has terminated at the port. This is discussed more fully hereinafter in the argument, and particularly in Section C under the caption "Answering the Government's Present Contention".

But even if the Government's assumptions of fact could be supported by the evidence, we also dispute the legal contention that so-called "cooperation" (a loose and indefinite term) can be substituted for the statutory requirement of a "common arrangement" between the carriers. When traffic is "partly by railroad and partly by water", the water carrier is not subject to the Act, unless—

> "both are used under a common control, management, or arrangement for a continuous carriage or shipment."

It is conceded that the Respondent is an independent water carrier not under common control or management with any railroad line. Therefore, the irreducible minimum for the Government to show in this case is that the rail and water carriage are both used under a "common arrangement" for a continuous carriage or shipment.

It is clearly established by the decisions hereinafter referred to that a common arrangement does not exist unless there is some agreement between the rail and water carriers relating to the continuous carriage or entire transportation. The agreement may be either express or implied. It is conceded there is no express agreement in this case. And in the absence of a common control or management the nature of the subject matter is such that a common arrangement can be implied only from circumstances which show some *community of interest* between the carriers with respect to the use of both their lines for a continuous carriage. The decisions hold that the implication may be found from transportation under a through bill of lading or from some conventional division of one entire charge for the whole transportation. While it is not contended that a common arrangement might not possibly be otherwise manifested, yet no case has ever arisen where the common arrangement has been implied from other circumstances. This is naturally so because it is hard to conceive, from the nature of the subject matter, the existence of a community of interest in the entire journey on the part of two carriers not based on a division of freight earned for the entire journey. The only consideration to the carriers for transportation service is their freight charges. And if the carriers are truly independent of each other and not subject to any common control or management it is difficult to conceive the circumstances which would give them a community of interest in the continuous

shipment, unless there is some agreement between them as to the division of the freight charges.

We understand it is not now contended by the Government that there was in this case a through bill of lading or any agreement between the carriers for division of freight charges. And as we understand the statement of the question as presented by the Government, it excludes the necessity of finding the existence of any agreement between the carriers creating a community of interest between them. In lieu of such an agreement the Government contends a common arrangement may be found merely from alleged "cooperation". The term "cooperation" is itself too loose and indefinite in meaning to have any precise significance. To give it definition, resort must necessarily be had to the facts of the case, which show that what is referred to is merely a descriptive memorandum made on the rail bill of lading by the shipper by suggestion from the rail carrier, the effect of which is to facilitate the place of delivery of the goods at the port, but the memorandum does not itself make effective further transportation by water. Such cooperation clearly does not establish any community of interest, or other common arrangement between the carriers for a continuous shipment.

STATEMENT OF THE CASE

The case began with the filing by the United States of a petition for mandamus against the Munson Steamship Line in the District Court of the United

States for the District of Maryland. Prayers of the petition were that the Munson Line should be required

"(a) To comply with the provisions of said Act to regulate commerce, as amended, particularly with respect to the filing of schedules and tariffs of rates and charges as required by Section 6 of said Act;

(b) To cease and desist from engaging and participating in the transportation of property, for hire, in interstate commerce, partly by railroad and partly by water, under a common arrangement for continuous carriage and shipment, unless and until said Respondent has filed with said Commission as aforesaid, its schedules and tariffs of rates and charges and has otherwise complied with the provisions of said Section 6 of said Act, as amended, with respect to the filing of said schedules and tariffs". (Record, p. 8.)

The most material averment in the petition, alleges that the Respondent, the Munson Steamship Line, does—

> "in conjunction with other common carriers * * * maintain and operate certain *through routes* and did and still does transport thereover shipments of property for hire, in interstate commerce, partly by railroad and partly by water, *under a common arrangement for continuous carriage and shipment,* as hereinafter more fully described; and throughout said period said Re-

spondent and the other common carriers above mentioned were, and still are, subject to the provisions of the Act of Congress approved February 4, 1887, entitled 'An Act to Regulate Commerce' and to the Acts of Congress amendatory thereof and supplementary thereto." (Record, p. 3.) (Italics supplied.)

The answer of the Respondent (Record, p. 10) categorically and circumstantially denied that with respect to the commerce mentioned it has ever, in conjunction with other common carriers by rail, transported property under a "common arrangement for continuous carriage and shipment", as alleged or otherwise.

The *issue in the case*, therefore, is one of fact—whether the transportation involved is conducted under "a common arrangement for continuous carriage and shipment", between the rail and water carriers.

After a trial of this issue on the pleadings and testimony before a jury (in accordance with the Maryland practice and the Conformity Act), the District Judge (Judge William C. Coleman) instructed a verdict for the Respondent on the ground in substance that on the uncontradicted evidence there was no "common arrangement" as alleged. (Record, pp. 112 to 117); 33 Fed. Rep. (2d) 211.

On appeal the judgment of the District Court was affirmed by the United States Circuit Court of Ap-

peals for the Fourth Circuit; opinion by Judge Parker. See 37 Fed. (2d) 681.

On petition of the United States this Court granted certiorari. (281 U. S. 715.)

JURISDICTION OF THE DISTRICT COURT

The District Court has no general jurisdiction in mandamus cases, but the petition of the Government was based on Section 20, paragraph 9, of the Interstate Commerce Act (49 U. S. C., Section 20, paragraph 9), which reads as follows:

> "*Jurisdiction to compel compliance by mandamus.* The District Courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter or any statutes supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this chapter and said statutes or any of them."

Exercise of jurisdiction under this Section in Interstate Commerce matters, without prior order of the Interstate Commerce Commission, seems to have been rare and District Judge Coleman at the trial expressed some doubts as to the jurisdiction of the Court but after further consideration decided that the Court had jurisdiction on authority of *United States vs. Union Stock Yards*, 226 U. S. 286.

Other instances of the exercise of jurisdiction in similar matters may be found in cases of *Interstate Commerce Commission vs. Bellaire, Z. & C. Ry. Co.* (Circuit Court, S. D. Ohio, E. D. January 11, 1897), 77 Fed. Rep. 942; and *United States ex rel. Interstate Commerce Commission vs. Chicago K. & S. R. Co.* (Circuit Court W. D. Mich. S. D. June 23, 1897), 81 Fed. 783.

THE PANAMA CANAL ACT

It is also to be noted that although the Interstate Commerce Commission itself has jurisdiction and power under proper procedure to establish through routes and maximum joint rates for the class of transportation herein comprehended by authority of what is known as the Panama Canal Act of 1912 (See Section 6, paragraph 13, of U. S. C., Title 49), it is obvious that this proceeding is not based on that Act as now codified, because it is admitted that the Commission has in fact not established any such through route or maximum or other rates for this class of transportation. See *Chicago, R. I. and P. R. R. Co. vs. United States,* 274 U. S. 29; *U. S. vs. N. Y. Cent. R. R.,* 272 U. S. 457.

The contention of the Government in this case is that irrespective of any order or action by the Commission with respect to this class of water transportation it is nevertheless *affirmatively the duty of the Munson Line on its own initiative* to file its schedules and rates with the Interstate Commerce Commission.

The Government's brief in the Court of Appeals referred at length to this Panama Canal Act as having

broadened the Commission's control and increased its regulatory power over rail and water carriers. While it was conceded by the Government that the existence of this statute does not dispense in this case with the necessity of proof by the Government of a "common arrangement" between the rail and water carriers, nevertheless it was argued that this enlargement of jurisdiction is very significant and should be considered in construing the jurisdictional clause in Section 1 of the Act. We submit this is not sound.

The argument seems to be that water carriers not subject to the Act by reason of the limitations in Section 1 may in some way nevertheless become subject to the Act, otherwise than by action by the Commission under the Panama Canal Act. Or in other words, as we understand the argument, it is in substance that the passage of the Panama Canal Act in 1912 has in some way expanded or amended the jurisdictional clause in Section 1 of the Act. This is not an admissible or proper rule of statutory construction. The Panama Canal Act does not undertake to and clearly does not expand the scope of Section 1 of the Act; although it does give new and additional powers to the Commission within the limitations of that special Act. Whether or not the Commission should act in any given case by the exercise of its powers under that Act is obviously a matter in the discretion of the Commission. Assuming that the Commission could properly act under the Panama Canal Act in establishing joint

or other rates for the class of water traffic embraced in this case, it is conceded that the Commission has not done so. As applied to this case the proper argument or inference from the existence of this unexercised power would seem to be directly contrary to that deduced by the Government. If the public interest requires that the class of water traffic here involved should be subjected to control by the Commission, then it is for the Commission in its discretion to act after proper notice and hearing by appropriate order. The failure of the Commission to so act would seem to imply that the public interest does not so require.

THE FACTS

A succinct statement of the controlling facts affecting the class of transportation in this case as found by the District Court and the Circuit Court of Appeals has been made by Judge Parker for the Circuit Court of Appeals (see Record, pp. 194 to 197), 37 Fed. (2d) 681. We are content to accept the facts as so found and stated by the two lower Courts as the basis for further discussion of the law applicable to the case; and on that basis it would be unnecessary to review the record for the facts in more detail. But the question for decision as stated in the Government's brief (p. 2) assumes facts in the case disputed by us and in our view not consistent with the facts as found by the lower Courts. For this reason only, and in support of the findings as so made by the lower Courts, we now refer in detail to the testimony in the Record.

As we have said, the Government's petition alleges that the Respondent with other common carriers maintains and operates "through routes" partly by rail and partly by water under a "common arrangement for a continuous carriage." The petition sets out a particular shipment as illustrative of the transportation practice alleged. However, the course of business is not in all respects fully and accurately stated in the Government's petition, but is correctly and fully set out in the Respondent's answer (Record, pp. 10 to 15). For convenience we summarize the applicable portion of the answer (which was fully and affirmatively supported by the testimony in the case without any real contradiction). It is as follows (Record, pp. 11, 12):

> "the shipper delivers merchandise to a rail carrier for transportation to Baltimore and for delivery to this respondent as agent of the shipper. The rail carrier to Baltimore issues its bill of lading to the shipper showing the destination of the shipment to be Baltimore, Maryland; in due course of transportation the merchandise is delivered to this Respondent as agent of the shipper, the bill of lading is surrendered to the rail carrier, the charges or freight of the rail carrier are paid by this Respondent as agent of and for account of the shipper, this Respondent then issues its bill of lading to the shipper for carriage of the goods by water from Baltimore, Md., to the point of destination. This Respondent was in this case and is in similar cases in-

structed by the shipper what disposition to make of the goods received for his account and the bill of lading issued by this Respondent is in accordance therewith. The freight rate for transportation of the goods by rail to Baltimore is in all cases fixed and determined by the bill of lading issued by the rail carrier and the same is in all cases paid by this Respondent only at the request and as agent for the shipper to the rail carrier upon presentation of bills for the freight from said rail carrier and there is no other contract in writing or otherwise, expressed or implied, existing between the shipper and/or this Respondent with the rail carrier than that shown in the rail carrier's bill of lading. The transaction is neither in form nor in substance an arrangement or contract or agreement between the shipper on the one part and the rail carrier and this Respondent jointly on the other for a 'through' shipment by rail and water to a point of ultimate destination, but consists of two entirely separate contracts of carriage, one made by the shipper with the rail carrier for carriage to Baltimore, only[,] where it terminates absolutely (and to which the Respondent as a carrier is not a party), and the other a contract of water carriage between the shipper and this Respondent only (not affected in any way by the former contract of carriage with the rail carrier), to which the rail carrier is not a party and with which the latter has no concern whatever. And there is no agreement whatever between the rail carrier and this Respondent as to time or terms of further

carriage, or rate of charge therefor, by this Respondent, or any arrangement or understanding between them as to division of total charge to the shipper, nor as to any time or contingency as to payment of the rail carrier's charge."

The Government's case was apparently wholly based on the inferences which it sought to raise from its construction of the legal effect of certain transportation documents issued in five separate shipments selected by the Government from the Respondent's records, supplemented in part by files of the railroad carriers. By agreement of counsel, however, there were also introduced by the Government other papers pertaining to the same shipments voluntarily supplied from the files of the Respondent and for the purpose of showing the full course of the transportation practice. These documents were offered in evidence by the Government as its case and are contained in the Record, pages 119 to 183, inclusive. In all or most of the several illustrative shipments the papers consist of the following:

1. Shipping order or bill of lading issued by the rail carrier to the shipper at some inland point.

2. A waybill accompanying the shipment for railroad carrier's employes.

3. Freight bill prepared by the rail carrier and rendered to the Respondent at Baltimore for the freight due the rail carrier.

4. A letter from the Respondent to the rail carrier with check in payment of the freight bill.

5. A letter of instructions from the shipper addressed to the Respondent at Baltimore directing disposition of the shipment.

6. A marine or ocean bill of lading issued by the Respondent to the shipper.

The only evidence offered by the Government in addition to these documents was the testimony of *White*, an agent of the Baltimore and Ohio Railroad at Locust Point, who described the physical operations involved in the delivery of goods from the railroad cars at Locust Point, the terminal of the rail carrier, to the ships of the Respondent; and also the testimony of *Sweeney*, general traffic manager of the Merchants and Miners Transportation Company (a carrier by water from Baltimore), who testified that his company did file with the Interstate Commerce Commission a schedule of tariffs showing rates to Florida points, carried by rail to Baltimore and by water to Florida from Baltimore, by his company on *through bills of lading*. (In passing it may be noted that some water carriers do *at their option* make common arrangement or agreements with rail carriers for *through shipments from inland points*. And, of course, when this is done the tariff must be filed with the Interstate Commerce Commission. The making of such agreements or arrangements is, however,

optional with the water carriers and not obligatory on them.)

The Government's contention as set out in its petition and by its counsel at the trial was in substance that the transportation documents accompanying the illustrative shipments showed on their face that there was a "common arrangement" between the rail carriers and the Respondent for a continuous carriage or shipment from the inland point to the Florida point (or at least that the documents were evidence from which the jury might infer such a common arrangement). Or stated more succinctly the Government's contention was that these transportation documents, and particularly the railroad bill of lading, constituted a "through" bill of lading.

The contention of the Respondent was that (a) the documents did not constitute a through bill of lading and did not raise even a *prima facie* inference contended for by the Government, and (b) that even if there was such a *prima facie* inference it was not conclusive in fact, and (c) was destroyed by the actual facts which clearly negative any common arrangement between the rail and water carriers.

While the Respondent could, we submit, have successfully rested on the deficiencies of the Government's case without producing any testimony in its own support, nevertheless as the case was in the nature of a test one, and it was desirable to have the ques-

tion determined on the full statement of the customary practice involved, the Respondent called as witnesses the heads of the executive departments of both water and rail carriers, who were thoroughly familiar with the customs of the business and who testified explicitly and expressly what these customs were and that there was no common arrangement between the rail and water carriers as to this class of transportation. The record, therefore, clearly and fully presents a picture of the transportation practice involved. In brief, it fully supports the summarized statement above quoted from the Respondent's answer. The witnesses who so testified for the Respondent were Mr. *Walter P. Coria,* the Baltimore manager for the Munson Line for the last ten years, before which time he had been connected with the Merchants and Miners Transportation Company for thirty-nine years; Mr. *Frederick J. Couse,* head of the *foreign freight department* of the Baltimore and Ohio Railroad, with special charge of intercoastal and coastwise traffic. The witness had been the head of that department for fourteen years. Also Mr. *William F. Emrich,* who occupied for Baltimore a similar position with the Pennsylvania Railroad Company; and Mr. *Winfield S. Burton,* who occupied a similar position with the Western Maryland Railway Company. These three rail lines are the only ones which have terminals in Baltimore. Mr. *Edward K. Morse,* general freight traffic manager of the Munson Line

with headquarters in New York, also testified on the same subject.

From the testimony of these witnesses it also appeared, without contradiction, that the customary practice of the Munson Line with respect to coastwise traffic from Baltimore to Florida is in no way peculiar or unique and that in general the same practice is followed both for "coastwise traffic" and for "intercoastal traffic" by independent American water carriers generally. (Record, pp. 41, 61, 103.)

It also appears from the testimony of Mr. Morse that the Munson Line is an old New York corporation, a relatively large steamship line, operating generally in the neighborhood of 100 steamers. The greater part of its business is international. It has a line to South America, a number of lines to Cuba, and does a general tramp business almost anywhere. It is a stock corporation and is not owned or controlled by any railroad company or steamship company and is a really independent line. It is not affiliated with any rail carriage system such as the Morgan Line is with the Southern Pacific Railroad. (See Record, p. 102.)

"Coastwise traffic" is what is known as port to port business on the Atlantic Coast, while "intercoastal" business is port to port traffic going through the Panama Canal. The opening of the Panama Canal gave a great deal of stimulus to the volume of freight transportation to the seaboard, the reason be-

ing that the actual cost of combined rail and water transportation from inland points, as far west as Pittsburgh or even farther, to Baltimore, plus the ocean voyage through the Canal up to San Francisco is less than sending such freight by all rail across the Continent. The railroads, therefore, and particularly the Baltimore and Ohio, actively solicit transportation of freight from inland points to Baltimore destined ultimately to go on from Baltimore by water carriage to other Atlantic ports or through the Canal. And similarly but separately water carriers solicit transportation of such freight originating inland for their respective lines. (See particularly Record, p. 62.) These witnesses, and particularly Mr. Couse, being thoroughly familiar with customs of the business relating to the various transportation documents offered in evidence, testified quite fully with regard to various points under discussion in the case relating to the documents and to the course of procedure of the rail and water carriers respectively regarding the illustrative shipments and the general practice in similar transportation. All these witnesses testified explicitly and categorically that the documents *do not show a through bill of lading* in any case and that the class of business involved is never handled on a through bill of lading and that the documents relied on by the Government as tending to show a through bill of lading do not in fact do so. The customary practice of the Munson Line at Baltimore in soliciting

freight for Florida points is shown by illustrative letters set out in the Record, pages 28 to 35.

The practice of the Baltimore and Ohio Railroad in soliciting rail transportation for such business is shown in the circular issued by it (Record, pp. 63 to 66), from which it is noted that the respective shippers are informed "the Munson Steamship Line will accept freight on through bills of lading to Havana, Cuba, but *not on traffic destined to Florida*" (Record, p. 65).

Here it is convenient to note the distinction between domestic port to port business and *export* freight by water carriage for foreign ports. The Interstate Commerce Act primarily covers interstate domestic and not foreign commerce. And with respect to through bills of lading it is to be noted that Section 25, paragraph 5, of the Interstate Commerce Act (Title 49, Transportation, U. S. C., Title 49, Sec. 25 [5]), relating to "schedules and rates of water carriers in foreign commerce" provides as follows:

> "The issuance of a through bill of lading covering shipments provided herein shall not be held to constitute 'an arrangement for continuous carriage or shipment' within the meaning of this Chapter (Act of February 28, 1920, Chap. 91, Sec. 441, 41 Stat. 497)."

It is also affirmatively and expressly clear from the testimony of all these thoroughly experienced, well informed, and mostly disinterested witnesses that the

rail bill of lading is an accomplished and fully executed contract when delivery of the goods is made at Baltimore to the Respondent as agent for the shippers and that thereby *all control of the shipment by the rail carrier is terminated* and that no liability exists on it for whatever may occur to the goods thereafter; and also that there is no understanding or arrangement of any kind with regard to the carriage between the rail and water carrier and specifically no arrangement or understanding of any nature with respect to any proportional division of the *total freight* earned by rail and water carrier. On the contrary the rail carrier earns a freight which, from the point of inland origin to Baltimore, is strictly in accordance with its published tariffs on file with the Interstate Commerce Commission and has no interest or concern of any kind in the ocean freight, and the rail carrier renders the bills for its earned freight in due course of business to the Munson Line and receives payment therefor in due course without any understanding or agreement other than the regulations prescribed by the Interstate Commerce Commission for that class of freight.

A point is here to be noted with regard to the time of payment of the rail freight bills by the Respondent. In the Government's petition the allegation would seem to be that the practice was for the Munson Line to defer payment to the rail carrier of its earned freight until after collection from the consignee and

inferably only on the condition of such collection. This is denied by the answer (Record, p. 13). And the Respondent's testimony supports the answer without contradiction. That is to say, the payment by the Munson Line to the rail carriers is in no way conditioned on or dependent on prior collection from the ultimate consignee. As a matter of fact the tabulation offered in evidence (Record, p. 185) shows in all five illustrative shipments that the rail freight bill was paid by the Munson Line prior to the arrival of the goods at their Florida port of destination and prior to the collection of the freight from the ultimate consignee, or at least prior to receipt in Baltimore of freight so collected. The general practice is well stated by Mr. Couse (Record, p. 69), as follows:

> "There is no arrangement of any kind with the Munson Line regarding division of freight, or any contingent arrangement that if they cannot collect the freight, the railroad will not hold the Line liable for it. The general practice with regard to the collection of the railroad inland freight is for the Munson Line to pay the railroad charge and carry it against the shipment and collect the total from the consignee, the Railroad Company rendering its bill to the Line. The bill is rendered on the basis of the railroad full local to the port, meaning by that, the Railroad published filed rate from the shipping point or origin to Baltimore. There can be no arrangement in any particular case whereby the Munson Line pays more or less to the Railroad than the pub-

lished rate. The Railroad would not accept more or less. If it did, it would be violating the law."

There was some discussion at the trial of the case as to what are the exact applicable regulations of the Interstate Commerce Commission as to the time within which freight bills on this class of business must be rendered by the rail carrier and paid by the Munson Line as agent of the shipper or to itself as consignee. It does not clearly appear from the record just what is this applicable period of grace. Some of the witnesses seem to think that the regulation called for a payment in four days exclusive of Sundays and holidays after delivery of the goods by the rail carrier. Elsewhere the time is spoken of as within a certain time after the sailing of the particular ship. The tabulation referred to (Record, p. 185) shows some variation in time of payment with respect to number of days elapsing between receipt of freight bill by Munson Line and date of payment. If does, however, affirmatively appear that there is no unusual or special consideration shown by the railroad with respect to the Munson Line or other water carriers doing similar business but that such delay, if any, beyond the time prescribed by the regulations in the cases noted was purely accidental and caused by possible delay in ordinary office routine, there being delay sometimes in rendering the bill by the rail carrier or errors in the bill when first rendered and sometimes ordinary

delay in payment owing to the practical inability of the Munson Line to assemble and audit the bills until the day of or after the sailing of the particular ship. It is clear that the delay, if any, in particular cases is not by reason of any special indulgence arranged or agreed upon between the rail and water carrier. (See testimony Couse, Record, p. 69, Burton, p. 96 bottom, Morse, p. 105, Coria, p. 37).

It is also affirmatively clear from the testimony of the witnesses and particularly that of Mr. Coria. (Record, pp. 36, 38, and Couse, p. 80) that the Munson Line *in every case* receives *instructions from the shipper what disposition to make of his goods.* (See for illustration Record, pp. 131, 147, 159 and 183.) Each of these exhibits is a letter from the shipper to the Munson Line directly expressing the order of the shipper as to disposition of the goods by the Munson Line. Special attention is called to the exhibit, page 183, which is the order from a shipper known as the "My Own Company." The shipment therein referred to was by the rail bill of lading consigned to Van Camp Products Company, in care of Munson Line at Baltimore, Maryland. The My Own Company was the shipper. By its letter dated October 18, 1927 (Record, p. 183), it countermanded authority for the delivery of the shipment to the Van Camp Company and directed the shipment to be sent to Louis Chitty of Jacksonville, Florida. The marine bill of lading was issued accordingly (Record, p.

179). This is, of course, an illustration of Mr. Coria's testimony, not only that in every case the Munson Line requires special shipping directions from the shipper, but also that the consignee as named in the rail bill of lading is not controlling and that on the contrary the shipment remains under control of the shipper and the goods are received by the Munson Line as *agent for the shipper and subject to his orders.*

It also appears from the testimony of these witnesses that if the rail bill of lading is an "order bill of lading" it must be sent by the shipper to the Munson Line and surrendered by the Munson Line to the railroad to get the delivery of the goods. And in the case of *every shipment* the Munson Line issues its own bill of lading, sending it to the shipper or as directed by him. (See for illustration Record, pp. 127, 143, 169, 173 and 179.) Obviously the goods are subject only to the ocean bill of lading issued by the Munson Line for the water carriage. The Munson Line is in no way a party to the rail bill of lading and the rail carrier is in no way a party to the ocean bill of lading. *The rail and water carriages are, therefore, separate and independent.*

The contention of the Government (at the trial) that the transportation documents constitute a "through" bill of lading seemed to be based principally if not entirely on the notation in the rail bill of lading, in the space captioned as follows:

"Description of articles, special marks and exceptions,"

of the following legend:

"For Charles C. Fisher, Miami, Florida" (Record, p. 119).

And in another rail bill of lading in similar location is the notation—

"For forwarding to Miami, Florida" (Record, pp. 149, 161.)

It will be noted, however, that this notation does not show the *destination of the goods under the rail bill of lading*. In each case the bill of lading is to Baltimore, Maryland. The reason for the notation is clearly shown in the testimony of Mr. Couse. In the Baltimore and Ohio circular already referred to (page 65) the instruction to the shipper by the Baltimore and Ohio is as follows:

"Rail bills of lading should show name of ultimate consignee, c/o the designated steamship line, destination Locust Point, Baltimore, Md., and in the body of the bill of lading should appear notation indicating ultimate destination in Florida."

Note 1. Traffic for the Munson Line should be consigned in their care, Curtis Bay Merchandise Pier of the Baltimore and Ohio Railroad, Curtis Bay, Md.

On this point, the testimony of Mr. Couse (Record, p. 68) was:

"The effect of the notation in the box headed 'Description of Articles and Special Marks and Exceptions' is merely for information and largely for the rail carrier. The explanation of the remarks in the box is that if a shipment merely came in consigned to the Munson Line or care of the Munson Line it would have to be held out in the yard until the Baltimore and Ohio knew where it was going. By that the witness meant that the Baltimore and Ohio would have no information which would indicate whether it was going intercoastal, or to Havana, or going to Florida ports. Having this notation in the body of the bill of lading helps the railroad company to the extent of segregating that property and facilitating the delivery of it by proper classification in the Baltimore and Ohio 'hold' yard. The Railroad Company has a number of different delivery points here in Baltimore. For export business it takes the freight nearest to the pier for which it was intended of that line. The Railroad Company has approximately ten piers. The notation in the body of the bill of lading helps the Railroad to know to which of its ten piers it is most convenient to take this particular freight. In the case of the Munson Line, it is even more marked, because they load their intercoastal steamers at Curtis Bay and their coastwise steamers at Fell Street. The two are about seven miles apart, so the point to the witness' remark may be seen."

Succinctly summarized, therefore, the uncontradicted testimony shows the following:

1. No agreement or arrangement of any kind between the rail and water carrier for a through shipment.

2. No through bill of lading.

3. No through or joint rate.

4. No agreement between the carriers for the division of the aggregate of the separate rail and water rates.

5. No agreement as to time or contingency of payment by water carrier of rail rate.

6. *Affirmatively* in every case instructions from the shipper to the Munson Line what disposition to make of shipment.

7. In every case issuance by Munson Line to shipper of its own marine bill of lading.

8. Definitely announced policy (and practice consistent therewith) of Munson Line both to railroads and shippers that it will not accept or participate in through bills of lading for Florida ports.

9. These facts affirmatively and without contradiction show *two separate and independent contracts of carriage;* one made by the shipper with the rail carrier; and the other separately made by the shipper with the water carrier.

10. These facts also show that the Munson Line is doing a strictly "port to port" business, which, as

elsewhere pointed out in this brief, necessarily lacks certain very definite advantages to the shipper which exist in "through billing."

ARGUMENT

INTERSTATE CARRIERS BY RAIL ARE UNCONDITIONALLY SUBJECT TO THE INTERSTATE COMMERCE ACT; BUT WATER CARRIERS ARE SUBJECT TO THE ACT ONLY WHEN THE TRANSPORTATION IS "PARTLY BY RAILROAD AND PARTLY BY WATER WHEN BOTH ARE USED UNDER A COMMON CONTROL, MANAGEMENT, OR ARRANGEMENT FOR A CONTINUOUS CARRIAGE OR SHIPMENT."

THE RESPONDENT CARRIER IS NOT SO SUBJECT BECAUSE ITS LINE IS NOT USED WITH ANY RAIL LINE UNDER EITHER COMMON CONTROL, MANAGEMENT, OR ARRANGEMENT FOR A CONTINUOUS CARRIAGE OR SHIPMENT.

A

THE STATUTE AND ITS EVOLUTION

(1) CONGRESS HAS ALWAYS DISTINGUISHED BETWEEN RAIL AND WATER CARRIERS IN INTERSTATE COMMERCE LEGISLATION.

Section 6 (1) of the Interstate Commerce Act, as now amended and codified (U. S. C., Title 49, Transportation), provides in part as follows:

> "1. Schedules of rates, fares and charges; filing and posting. *Every common carrier subject to the provisions of this chapter* shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and

the points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established." (Italics supplied.)

The immediate question arises as to what common carriers are subject to the provisions of the Act. This we find provided for in Section 1 of the Act (U. S. C., Title 49, Transportation, paragraph 1 [a]), which reads as follows:

"1. *Carriers subject to Regulation.* The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, *or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment.*" (Italics supplied.)

As to the evolution of the act it is to be noted that, *so far as water carriers are concerned*, the phraseology is precisely the same as that contained in the original Act to Regulate Commerce, February 4, 1887, 24 Stat. L. 379, Section 1. This section of the original Act was amended by the Hepburn Act of June 29, 1906, 34 Stat. L. 584, Section 1, and was further amended by the Mann-Elkins Act of June 18, 1910, 36 Stat. L. 534, Section 7. It now reads as amended by Section 400 of the Transportation Act, 1920, February 28, 1920, 41 Stat. L. 474. For convenience

the changes in phraseology from the original Act to its present form can be found in a recent publication entitled "The Legislative Evolution of the Interstate Commerce Act", by Miller, pages 1 to 6.

It is also to be noted by this comparative legislation that as applied to railroad carriers (in interstate commerce, of course) the punctuations of the phraseology in the original Act have been importantly changed by the amendatory Acts. The wording of the original Act and the punctuation was as follows:

> "that the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment from * * *".

The Hepburn Act changed the punctuation so that the clause read as follows:

> "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) * * *."

The Mann-Elkins Act continued the phraseology and punctuation as it was in the Hepburn Act.

The question for jurisdictional construction which arose was whether the modifying phrase "when both

are used under a common control, management or arrangement for a continuous carriage or shipment." applied to transportation "wholly by railroad". By practically unanimous federal judicial construction it was held that this modifying clause *in the original Act* did apply to transportation wholly by railroad as well as to transportation partly by railroad and partly by water. *Cincinnati, N. O. & T. P. Ry. Co. vs. Interstate Commerce Commission*, 162 U. S. 184, 191; *L. & N. R. Co. vs. Behlmer*, 175 U. S. 648. See also *Int. Com. Com. vs. Bellaire Z. & C. Ry. Co.*, 77 Fed. Rep. 942; *United States vs. Chicago K. & S. R. Ry. Co.*, 81 Fed. 783; Roberts Federal Liability of Carriers (2nd Ed.), Section 113.

The change in punctuation made by the Hepburn Act obviously changed the scope of the modifying clause as to common control, etc., so that it no longer applied to transportation wholly by railroad; and it is assumed (without judicial decision so far as we know) that by the present wording and punctuation of the clause the modifying phrase "common control, etc.", still is inapplicable to transportation wholly by railroad. It is important in reading the decisions as to what carriers are subject to the Act to bear in mind that railroad connecting carriers in interstate commerce are subject to the Act, since the Hepburn Act of 1906, without regard to whether they operate under "common control, management or arrangement". The test as to them is merely whether they

are engaged in *interstate commerce*. But before the Hepburn Act a pure intrastate carrier was not subject to the Act unless it was operated under common control, management or arrangement with some interstate carrier.

But with respect to water carriers there has been no change in the Act from its original passage. Therefore, at no time has a water carrier been subject to the provision of the Interstate Commerce Act unless it has been operated under a common control, management or arrangement for a continuous carriage of shipments with some rail carrier. *Wilmington Transportation Company vs. Cal. R. R. Com.*, 236 U. S. 151-153.

Further evidence of the intention of Congress to distinguish between rail and water carriers was found in Paragraph 2, of Section 1, of the Interstate Commerce Act, sub-section (c), providing that the Act shall not apply—

> "to the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this Act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district." (U. S. C., Title 49, Section 1, Paragraph 2 [c]).

See also Section 25, Paragraph 5, of the present Act relating to schedules and rates of water carriers in foreign export commerce, reading as follows:

> "The issuance of a through bill of lading covering shipment provided for herein shall not be held to constitute 'an arrangement for continuous carriage or shipment' within the meaning of this Act." (U. S. C., Title 49, Section 25, Paragraph 5.)

Still more importantly reference should be made to the "Shipping Act" (U. S. Code, Title 46, Sections 801 to 842), which created the Shipping Board and subjected common carriers by water in interstate commerce thereto, and requires the filing of tariffs and schedules of maximum rates with that Board and requires, on the order of the Board, the carrier to file reports and supply other information. The Munson Line has complied with the Shipping Act (see testimony of Mr. Morse (Record, p. 103; see also Record, p. 49.)

It is obvious that, if water carriers similar to the Respondent are not subject to the Interstate Commerce Act they are nevertheless subject to governmental regulation and control by the Shipping Act. And we submit that the only reasonable construction of the Interstate Commerce Act and the Shipping Act is to limit the application of the former to those water carriers who *voluntarily bring themselves within the scope of the Interstate Commerce Act by making the*

common agreement or arrangement with railroads, referred to in Section 1 of the Commerce Act.

In passing it is to be noted that if a water carrier is subject to the Interstate Commerce Act it is subject to all the provisions which are generally applicable to the carriers defined and included in Section 1. Among the obligations of compliance with the Act is not only the filing of schedules and tariffs of rates, under Section 6, but also the even more onerous and expensive compliance with Section 20 of the Act regarding the form, frequency and contents of reports to the Interstate Commerce Commission, and the keeping of records and accounts accordingly. The Act imposes a very substantial and expensive burden of compliance on those who are subject to it. The public good is, of course, paramount and this burden is thoroughly justified when it applies to large railroad corporations engaged in interstate commerce, but the burden might be prohibitive to small water carriers. The Baltimore-Florida intercoastal traffic here involved is a very small part of the whole marine traffic of the Munson Line, as most of its operations are in foreign commerce. If subject to the Act at all by reason of this relatively very small Florida business, it is arguable that reports to the Commerce Commission under Section 20 of the Act must include detailed reports of all the activities of the Respondent, including its foreign traffic, thus imposing an onerous and expensive accounting to the Commission by Re-

spondent, with incidental and undue advantages to its competitors in foreign trade. *Int. Com. Com. vs. Goodrich Transit Co.*, 224 U. S. 194.

(2) REASONS FOR THE DIFFERENTIATION

There are many other reasons well founded in public policy for the distinction made by Congress between transportation by rail and water carriers, respectively. The basis for this legislative policy is found in the different characteristics of rail and water carriage. Rail transportation in the United States is practically standardized and uniform. There is little difference so far as the carriage of goods is concerned between the service rendered by respective railroads, whether viewed from the standpoint of safety of carriage or speed of carriage or from the standpoint of convenience in receipt and delivery.

It is very different from water carriage. Diversity and not uniformity is there the rule. The character of service may be anything from an open barge to the Leviathan. Neither the safety of the cargo nor the rapidity of carriage is uniform with the different shipping lines. Nor is there uniformity of frequency of sailing dates. Rail carriage is practically a daily matter. Shipping carriage is seldom daily and may be so infrequent on any line as only monthly. Nor is there equal certainty of maintaining an arrival date or delivery for a particular market. Ships are subjected to perils, dangers and delays not applicable to

rail carriage. And shipping lines vary greatly between themselves as to speed, safety and frequency of carriage. It is obvious, therefore, that while rates for substantially uniform rail carriage should be themselves standardized and uniform, it would be quite unreasonable and generally against public policy to require uniformity of rates from shipping companies which give such diversity of service. Congress, appreciating these natural characteristics of rail and water carriage, has never undertaken to enforce uniformity of rates on water carriers.

Where the water carriers' service is so highly developed and stabilized that they can undertake to make "common agreements or arrangements" with connecting rail carriers for through carriage under one bill of lading, they are at liberty and have the option to do so. And there are certain advantages, of course, to the carrier that does adopt this policy. But it requires a relatively standardized service.

And some water carriers may for some lines develop and standardize their business to such an extent as to make it good business policy to enter into these common arrangements with connecting rail carriers. But for other and less standardized and more experimental lines, it might be very unwise policy for the water carrier to commit itself to hard and fast schedules, tariffs and rates.

Another consideration for a difference in legislative treatment of rail and water carriers arises from the fact that a railroad cannot be built overnight but a shipping line can be established any day. All that is required to establish a shipping line is to procure docking facilities at two or more ports and operate a vessel between the ports. Such a vessel can be detached from some other line or bought or may be otherwise available. Also a railroad once built practically cannot be abandoned without great loss of investment; while a shipping line that becomes unprofitable can be abandoned without great loss. Navigable waters are free to all, and stability of rates thereon impracticable in most cases.

The present Munson Line from Baltimore to Florida ports illustrates some of these features of water carriage. This particular line was established in 1926 when the volume of goods for transportation to Florida from the Baltimore territory was very great and so large that railroad and other shipping lines had placed an embargo as against goods for Florida ports, and particularly Miami. To relieve the congestion and to obtain some of the business this particular Munson Line was established. It is certainly doubtful whether Baltimore shippers and Florida consumers could have obtained this relief if the Interstate Commerce Act had required uniform rates and schedules and rigid adherence thereto. (Record, p. 69.)

B.

ADMINISTRATIVE AND JUDICIAL CONSTRUCTION AND APPLICATION OF THE STATUTE

(1) WHAT IS MEANT BY "COMMON ARRANGEMENT" IN THE STATUTE

The Government's brief in the Court of Appeals argued that the charge of the District Court to the jury shows a misconception of the meaning of the term "common arrangement for a continuous carriage or shipment." We submit, however, that the Court's construction and application of the statute is entirely correct and is thoroughly supported by the decisions herein quoted. The gist of the Court's charge on this point is (see Record, pp. 113-14) as follows:

> "It is to be borne in mind that if the Government is to succeed in the present case, the evidence must disclose two things: (1) that the arrangement for the carriage or shipment is a common one, and (2) that that carriage or shipment is continuous. By 'common' the Court thinks must be meant an arrangement between the two kinds of carriers, namely, the rail carrier and the water carrier, not merely an arrangement between the shipper and one of the carriers; and, further that this mutual arrangement must contemplate some participation by both carriers in a continuous carriage or shipment, which is the subject of the arrangement. * * * So turning to the word 'continuous' its use must be predicated upon the assumption that both the

rail and the water carrier participate in some way in the *entire* movement."

As an ordinary matter of construction of the Act, there seems to be nothing uncertain or ambiguous in the language used. The language should be construed, of course, in the light of the well known subject matter. The whole phrase is "*when both are used* under a common control, management or arrangement for a continuous carriage or shipment." The words "common control, management or arrangement" are obviously *ejusdem generis*. In this case the Government does not contend that there was a common control or common management, but only that there was a common arrangement. It is to be noted, however, that the phrase "when both are used" modifies "common arrangement" as well as "common control or management." And the language requires that both the rail and water carriage must be used under a "common arrangement for a continuous carriage." Now at the time of the passage of this Act there was a well-known distinction between (1) a shipment by one road or carrier *over its own line only* for delivery to another carrier to be carried to an ultimate destination beyond the line of the first carrier, and (2) a *through shipment* over the first line and the connecting lines to ultimate destination. In practice the shipper got a through bill of lading in the second case and after his delivery of the goods to the initial carrier he had no further need to worry about the shipment or to take any action with regard thereto.

The purpose and effect of a through bill of lading was well known and established in transportation law. It is defined in 4 Ruling Case Law, heading Bills of Lading, Section 3, as follows:

> "A through bill of lading is one whereby the carrier agrees to transport the goods from the point of delivery to a designated point of destination, although such transportation extends over the line of a connecting carrier. * * * The carrier's liability on such a bill does not cease when the goods are delivered to the connecting carrier unless the terms thereof so specify."

It is obvious that under a through bill of lading the initial carrier takes the shipment and "does the rest". The shipper has to make no other arrangement with any other carrier, he receives no other bill of lading from the connecting carrier, he gives no orders or instructions to the connecting carrier. He is through with the shipment from the time of delivery to the initial carrier. It and its connecting carriers automatically, through the force of the arrangement and through bill of lading, carry the goods by a through route and continuous journey to the point of ultimate destination. For the purposes of the shipment the roads or facilities of both carriers *are used as one* and this is by virtue of a common arrangement between the carriers. So far as railroads are concerned if the carriage is interstate under existing legislation through bills of lading are universally issued under

joint rates and tariffs fixed by the Commission. The initial carrier has no option in the matter but must comply with the shipper's wishes for a through bill.

If, however, the contemplated ultimate destination of the shipment involves a carriage by water from port to port, the Act *does not impose this obligation on the water carrier* to make common arrangements with the rail carrier. The water carrier, therefore, is not compelled on its own initiative to make a common arrangement with the rail carrier for a through shipment. It can make such an arrangement at its option and some water carriers do. The Munson Line does not. Consequently we see the essential differences in the arrangements that the shipper has to make in this case from a case where there is a through bill of lading. Here the shipper employs and pays the rail carrier to take the shipment to the port. He can and in this case often does direct the delivery of the shipment at the destination of the rail bill of lading to the steamship line as the consignee or as his agent. So far as the rail carrier is concerned it has no relation to, or control over, or liability for the shipment after delivery to the Munson Line. *According to the uncontradicted testimony in this case the shipment would stop at Baltimore and not go forward unless and until the shipper gives separate instructions to his agent, the Munson Line, for forwarding the shipment to Florida. By the uncontradicted testimony these instructions are given in every case.* The Munson Line

then issues its separate marine bill of lading to the shipper. That is to say, the shipper makes two separate contracts, one with the rail carrier and one with the water carrier. The two carriers make no arrangement or contract *inter sese*. The two links of the chain of the journey are not connected but are separate. One link is not legally attached to the other. There is no unbroken chain for the journey. The notation in the descriptive portion of the bill of lading is a mere convenient indication to the rail carrier at what point to make delivery of the goods to the Munson Line. It has no legal effect or significance. It has no operative control over the Munson Line. As we have seen, it is varied from at the pleasure of the shipper, which would not be the case on a through bill of lading.

We submit, therefore, that the meaning of the expression "when both are used under a common arrangement for continuous carriage" must necessarily be that, for the purposes of the particular shipment, both the rail and water carrier are linked together by a common arrangement between them whereby both for the particular case are used as one and the journey is, therefore, from the legal aspect, one continuous carriage. Of course, the transfer from the railroad car to the ship does not of itself prevent the journey from being a continuous one. But the consummation of the rail contract and the beginning of a new marine contract does preclude the finding of a common arrangement between the carriers for a continuous carriage, in the sense of the statute.

The meaning of the statute, read in the light of the subject matter and transportation customs existing at the time of its original passage in 1887, is so seemingly plain that there is really no need to resort to legislative history of the passage of the Act. We submit, however, that if resort is so made the plain meaning of the statute will be *confirmed* thereby. And in this connection reference may be made to Painter on Interstate Commerce Debates, Vol. 2, and particularly pages 5, 221, 264, 340, 342 and 565. The first reference to the clause under discussion is found in the remarks of Senator Cullom in introducing the Bill to the Senate as a Committee of the Whole. We submit that it is apparent from the discussion that there was no thought of subjecting the water carriers to the Act merely because they accepted goods as connecting carriers with railroads if the water carriers were independent.

The question may be asked why were water carriers included at all in the Act. This question is well answered by Chairman Knapp of the Interstate Commerce Commission (later a Circuit Judge) in the case entitled, *In the Matter of Jurisdiction over Water Carriers*, 15 I. C. C. at 207, where his language (as quoted by Judge Parker in his opinion in the Circuit Court of Appeals) is this:

> "Looking to the history of the enactment, and without attempting to quote the pertinent portions of the congressional debates and commit-

tee reports preceding the enactment of the law in 1887, there can be no doubt that the main purpose of the act was to regulate transportation by railroad; that the regulation of water lines was merely incidental and collateral, and was included in order that the regulation of railroads might be effective and not virtually nullified by arrangements between railroads and water lines."

And the matter was well summarized by Judge Parker, as follows:

"In other words, Congress was guarding against the possibility of evasion arising from the fact that water carriage was a part of the transportation furnished; and it was intended to subject the water carrier to the jurisdiction of the commission where it was within the power of the rail carrier to evade the Act by his control over water rates whether by control or management of the water carrier or other arrangement.

"It follows from this, we think, that the 'common arrangement' contemplated by the Act must be one between the carriers themselves, giving to one or the other, or both, such an interest in or control over the entire undertaking as to constitute the continuous transportation in some sense a common enterprise; for under no other sort of arrangement would there exist the possibility of manipulating water rates so as to evade the Act designed for the regulation of rail carriers. Such an arrangement as one to deliver freight at the end of a rail line to a water car-

rier to whom it is consigned and who transports it under a separate contract with the shipper is clearly not a common arrangement within the spirit of the provision which we are considering; for, while such an arrangement might result in continuous transportation, it would furnish to the rail carrier no opportunity to evade the Act against which the provision was directed." See Record, p. 198; 37 Fed. (2d), p. 684.

This Court has recently considered the subject of reference to the legislative history of an Act in confirmation of its plain meaning in *United States vs. Mo. Pac. R. Co.*, 278 U. S. 269, 278, where Mr. Justice Butler said:

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. • • •
>
> "But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used."

(2) DECISIONS BOTH OF THE COMMISSION AND OF THE FEDERAL COURTS ON SIMILAR FACTS UNIFORMLY FIND NO "COMMON ARRANGEMENT".

(a) DECISIONS OF INTERSTATE COMMERCE COMMISSION

In *United States vs. Mo. Pac. R. Co.*, 278 U. S.

269-280, Mr. Justice Butler also considered the effect of administrative rulings in aid of the construction of an Act of Congress, saying:

> "It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. See *e. g.*, *Logan vs. Davis*, 233 U. S. 613, 627. But the Court is not bound by a construction so established. *Chicago, etc., Ry. Co. vs. McCaull-Dinsmore Co.*, 253 U. S. 97, 99. *United States vs. Dickson*, 15 Pet. 141, 161. The rule does not apply in cases where the construction is not doubtful. And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons."

In *Luckenbach S. S. Co. vs. U. S.*, 280 U. S. 173, it was said as to construction of statutes:

> "In case of ambiguity a construction of a statute by the department charged with its execution should be favored by the Courts, and where such construction has been acted on for a number of years they will look with disfavor upon any sudden change, whereby parties who have contracted with the Government on the faith of it may be prejudiced."

It is submitted that the decisions of the Interstate Commerce Commission have been uniformly consistent with our contentions in this case.

In *Luckenbach Steamship Co. vs. Southern Rwy. Co.*, 157 I. C. C. 752 (decided by the Commission since the institution of this proceeding), the Commission itself said that water carriers handling freight substantially in the manner in which it is handled by defendant here were not subject to the jurisdiction of the Commission. (See further quotation from this case by Judge Parker, Record, p. 202, 37 Fed. [2d] 686.)

And in the case of Baltimore Association of Commerce vs. American Hawaiian Steamship Company before the Interstate Commerce Commission (Case No. 20306, pending when this proceeding was instituted) the very question was involved which is involved in this case. Examiner Hurley of the Commission filed a report finding that the Commission was without jurisdiction over the water carriers, and what he says as to notations on bills of lading and the payment of rail charges (identical with the facts in this case) are of particular interest.

In summarizing this point, he said:

> "The method of handling the traffic under consideration, although indicative of an arrangement for its prompt and efficient interchange, is lacking in the essentials necessary to constitute a 'common arrangement' between the rail and the water carriers. On the contrary, it clearly indicates their independence." (37 Fed. [2d] 686).

In *Wool Rates Investigation*, 1923, 91 I. C. C. 235, 275, it was said:

"Congress has not placed the intercoastal steamship lines under our jurisdiction to the same extent as the rail carriers. Their port to port rates are exclusively under the jurisdiction of the United States Shipping Board and the water carriers are free to charge any rate so long as they do not exceed the maximum schedules on file with the Shipping Board.".

And in *Transcontinental Commodity Rates*, 32 I. C. C. 449, the Commission said:

"As we understand it, the ocean lines (intercoastal lines) insist upon handling their business as a purely local transaction from port to port, and will not accept traffic on through bills of lading to or from the interior points. This is probably due to the fear on their part that the traffic, if handled on through bills of lading, would constitute transportation 'by rail and water', and therefore be subject to the jurisdiction of this Commission and to the requirements of the Act."

In *Corona Coal Co. vs. Secretary of War*, 69 I. C. C. 389, the Commission said:

"In the transportation act, 1920, Congress set forth explicitly our power and duty to deal with intrastate rates which unjustly discriminate against interstate commerce or unduly prejudice persons or localities engaged in such commerce, but made no mention of any similar or analogous power over local port-to-port rates of water carriers. On the contrary, wherever in the Act specific mention is made of such rates, the intent

is disclosed to exclude them from our jurisdiction. If Congress had desired us to have the power which complainant asks us to exercise, this could easily have been made clear."

See also:

Lake & Rail Butter & Egg Rates, 29 I. C. C. 45.

Augusta & Savannah Steamboat Co. vs. Ocean S. S. Co., 26 I. C. C. 380.

Ulman vs. Adams, 14 I. C. C. 340.

Lykes S. S. Line vs. Commercial Union, 13 I. C. C. 310.

(h) DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

In *Cincinnati, N. O. & T. P. Ry. Co. vs. Interstate Commerce Commission*, 162 U. S. 184 (the Social Circle case, decided in 1896, and therefore before the passage of the Hepburn Act), this Court dealt with the question of whether an interstate rail carrier was subject to the Act by participating under a *through bill of lading* in an interstate shipment. It was held to be subject to the Act and this Court said:

"All we wish to be understood to hold is, that when goods are shipped under a through bill of lading, from a point in one State to a point in another, and when such goods are received in transit by a State common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an

arrangement for a continuous carriage or shipment within the meaning of the Act to regulate commerce. When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested."

In commenting on this case Judge Parker in the Circuit Court of Appeals, correctly we think, said:

"It will be noted, that, while the Court does not hold that common control, management or arrangement may not be manifested otherwise than by through billing, it clearly implies that for any arrangement to come within the meaning of the Act it must result in the creation of a 'continuous line', *i. e.*, a line over which goods are transported by virtue of agreement, express or implied, between the carriers themselves. *And we think that no case can be found holding that a common arrangement existed within the meaning of the Act where there was not such 'continuous line', created either by through billing or conventional division of rates.* See *Interstate Com. Com. vs. Goodrich Transit Co.*, 224 U. S. 194; *L. & N. R. Co. vs. Behlmer*, 175 U. S. 648; *Standard Oil Co. vs. U. S.* (C. C. A. 2nd), 179 Fed. 614; *U. S. vs. Wood*, 145 Fed. 405, 411; *U. S. vs. Seaboard Ry. Co.*, 82 Fed. 563; *Levy vs. Old Dominion S. S. Co.*, 154 N. Y. S. 227." (Italics supplied.)

In the present case it will, of course, be remembered that there was no joint or total rate agreed upon by the carriers *inter sese*, and we contend no continuous line.

Most of the above cases dealt with transportation wholly by railroad. And we submit that none of them either held or even indicated that a common arrangement would be made out on facts similar to those in the present case.

On the contrary, *where the facts have been similar to those in the case at bar*, the holding has been that there was no "common arrangement" between rail carriers.

Thus in *Interstate Commerce Commission vs. Bellaire, Z. & C. Ry. Co.* (Circuit Court, S. D. Ohio, E. D. January 11, 1897), 77 Fed. Rep. 942, it was held by District Judge Sage that the respondent railway company was not obliged to file reports to the Interstate Commerce Commission under Section 6 of the supplementary Interstate Commerce Act of August 7, 1888, where the railroad's line was wholly within a single State and where it carried freight destined to points beyond such State but never issued bills of lading to points beyond its own line and received no freight on through bills of lading and had no arrange-

ment with other roads for a conventional division of charges or for a common control or management. District Judge Sage said:

> "It appears from the testimony of the receiver of the road and its auditor that, although a common carrier of freight, including freight marked and destined to points beyond its terminus, and in many cases to points beyond the State lines of Ohio, it never issues a bill of lading to any point beyond its own lines. Upon the bill of lading the marks upon the freight, the name of the consignee, and the destination, appear, but the bill of lading itself is always limited to the line of the company's road. It also appears that its charges upon freight destined for points beyond its own terminus are paid as advance charges in many instances by the railroad company which takes the freight to its final destination.
>
> "Further, it appears that the company receives no freight under through bills of lading; that is to say, if freight comes from another carrier destined to a point on its own line, it invariably issues its own bill of lading, and refuses to receive such freight upon any through bill issued by another company, although it pays advance charges when necessary, and collects them from the consignee."

Judge Sage then reviews the case of *Cincinnati, N. O. & T. P. Ry. Co. vs. Interstate Commerce Commission*, 162 U. S. 184 (The Social Circle case), with

particular reference to the expression of Mr. Justice Shiras as follows:

> "When we speak of a through bill of lading, we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."

Judge Sage then says:

> "Such control, management or arrangement is not however otherwise manifested in this case."

Even though the Court also found as follows:

> "By arrangement between the defendant company and the Baltimore & Ohio Company, and for compensation, the freight agent and the passenger agent of the Baltimore & Ohio Company acted in that capacity also for the defendant company, and attended to its business; but there is in no sense any community of interest between the companies, nor is there in any instance any arrangement for the continuous carriage of freight, nor for the division of charges.
>
> "My opinion, therefore, is that the defendant company is not within the purview of the Interstate Commerce Act, and cannot be compelled to make the report called for. I have no doubt that Congress would have the power to amend the Act so as to require this and other companies

occupying like relations to file reports, inasmuch as they all carry freight destined for points beyond the State in which the road is located. But the Act is not so framed as to include the defendant company, and, while it is a proper act of courtesy for the defendant company to furnish annual copies of its report to the State Commissioner of railroad and telegraphs, it cannot be forced to make such reports. The provision of the supplemental Act is to be strictly construed, for the reason that Section 6 enacts that the failure or refusal to make report shall operate as a forfeiture in each case in a sum of not less than $1,000 nor more than $5,000, to be recovered by the Attorney General of the United States, in the name and for the use and benefit of the United States. The Act is, therefore, penal in its nature."

A similar conclusion was reached in *United States ex rel. Interstate Commerce Commission vs. Chicago K. & S. R. Co.* (Circuit Court W. D. Mich. S. D. June 23, 1897), 81 Fed. 783, by District Judge Severens under similar facts. This latter case also came up on a petition for mandamus to compel the Respondent railroad company to file a report under the provisions of the Interstate Commerce Act. It was said—

"It appears from the answer and amended answer, which are taken by the parties as showing the facts of the case, that both the termini of the defendant's railway are within the State

of Michigan, that it transports freight, whether shipped upon its line for destinations out of the State or from abroad to stations on its own line, upon local bills of lading under a special contract of carriage limited to its own line. It does not do such business upon through rates, which it divides with other carriers, or assume any obligation to or for them in respect of such carriage; and the delivery which it makes to other carriers, and its reception from them of freight, is not substantially different from a delivery to or reception from any consignee or consignor. * * * The result is that the defendant is not subject to the requirement of the Commission to make report to it of its business under Section 20 of the Interstate Commerce Act, and that the motion for a mandamus to compel it to do so must be denied."

A similar view was taken by the Circuit Court of Appeals for the Sixth Circuit in *United States vs. Geddes*, June 8, 1904, 131 Fed. Rep. 452 at 456, where Circuit Judge Richards said:

"In the present case there was no through bill of lading, no through charge, no conventional division thereof among the carriers and no arrangement for a continuous carriage or shipment, unless the method of transfer by which the receiving road assumed the payment of the charges of the delivering road constituted such an arrangement. If it did, then the only way a local road can escape participation in an arrangement

for a continuous carriage or shipment of freight from one State to another is to refuse altogether to handle such freight; and it cannot do this, for, as a common carrier, it is bound to receive and transport from one point to another on its line, freight offered it for transportation, regardless of the origin or destination of the freight; * * *

"The defendant company did all it could to keep its business local. It limited its interest, so far as it could, to the transportation of the freight over its own line. It made no arrangement with the Baltimore and Ohio for through carriage either way. It was interested in none. It shared none. It was interested only in its own local charge, and whatever arrangement it made was with a view simply of securing this. The fact that certain goods transported by it were marked for other States or received from other States did not make it a party to any arrangement for their interstate transportation in either direction. The part it performed was purely local."

See also the same case in the District Court S. D. of Ohio E. D. August 19, 1903, 180 Fed. 480.

(c) CASES DEALING WITH WATER CARRIERS

There are fewer decided cases involving water carriers in this connection. One of the earliest and frequently cited cases is *Ex Parte Koehler*, 30 Fed. 867 (Cir. Ct. of Oregon, 1887), where in considering

what constituted common control and continuous shipment District Judge Deady said (page 869):

> "The mere fact that a railway wholly within a State and a vessel running between said State and another meet at a point within the railway State, and thus form a continuous line of transportation between the two States, by the one taking up the goods delivered by the other at its terminus, and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the Act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates, and only liable for the carriage and safe delivery of the goods at the end of its own route, the Act does not apply to the transaction. To make these carriers subject to the Act, the railway and vessel must, as therein provided, be operated or used under a 'common control',—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one."

In a recent case, *American Cast Iron Pipe vs. Atlantic Gulf and Pacific SS. Corporation* (S. D. of Fla.), 2 Fed. (2d) 397, District Judge Call said:

> "There is nothing in the amended libel to show that the shipment was to be a continuous one from Birmingham to the Pacific Coast, or that

a through bill of lading was issued by the carrier receiving the iron pipe for transportation to Mobile. On the other hand, it seems to me that the allegations of the amended libel, when properly construed, allege that, insofar as the transportation of the iron pipe is by water, the shipment originates at Mobile. The terms of the Interstate Commerce Act do not apply to the contract alleged in the pleading."

In *Mutual Transit vs. United States*, 178 Fed. 664 (C. C. A. [2nd] 1910), there was a criminal prosecution against a water carrier for giving an alleged rebate to a shipper. The opinion of the Circuit Court of Appeals (reversing that of the District Court) in holding that the water carrier was not subject to the Act because it had entered into no common arrangement with the rail carrier, said, among other things, as follows:

"The phrase 'common arrangement' in view of its context, evidently means an agreement or understanding between connecting carriers with respect to the transportation of merchandise and the charges and division of the charges to be made therefor. A mere agreement by an independent water carrier to accept freight from a connecting railroad, and to transport it for its own particular rate, might be an 'arrangement' for continuous carriage, but would not be a 'common arrangement. * * *'

"The real arrangement under which this

freight moved was made between the defendant and the shipper. The defendant entered into no agreement with the other carriers. They were not parties to its agreement with the shipper. * * * The mere fact that the initial carrier made out the bill of lading according to its published rates and division sheets, and that the defendant permitted the carriage to go on under such documents, did not, in our opinion, make it a party to a 'common arrangement' for a rate in excess of that stipulated in the real contract under which the freight was offered for transportation."

In the particular case the shipment moved on a through bill of lading issued by the initial rail carrier but prior to the shipment the water carrier had agreed with the shipper to "protect" a rate lower than that named in the rail bill of lading for the water carrier. And as to this the court said:

"An intermediate water carrier which is a party to a special agreement with a shipper covering a shipment cannot properly be said to be a party to a 'common arrangement' wholly inconsistent therewith merely because of recitals by the initial carrier in the bill of lading. Especially should this be true where the water carrier has refrained from concurring in the tariff under which the recitals are made."

See also a similar decision on the same facts in

Camden Iron Works vs. United States (C. C. A. 3rd), 158 Fed. 561.

State Court decisions on similar facts are to the same effect.

Macomber and Whyte Rope Company vs. United Fruit Co. (1922), 225 Ill. App. 286.

American Peanut Corporation vs. St. Louis and Tennessee River Packet Company (1923), 3 Tenn. Apps. 552.

Levy vs. Old. Dom. S. Co., 154 N. Y. Supp. 227.

We have referred above to decisions of the Interstate Commerce Commission on similar facts affecting water carriers.

The understanding of the law in well known text books is stated to the same effect. See 12 *C. J.*, page 121; *Roberts on Federal Liabilities of Carriers*, 2nd Ed. 1929, Secs. 114, 116, where the author says (114):

"The primary purpose of Congress in the passage of the statute was to regulate transportation by railroad. The control of carriers by water was merely incidental and collateral, and they were included so that the regulation of carriers by rail might be effective and not be destroyed by subterfuges and contracts entered into with

water lines. When water carriers become amenable to the requirements of the statute and the jurisdiction of the Interstate Commerce Commission, they do so by choice in entering into a common arrangement or control with railroads."

See also to the same effect *Moore on Interstate Commerce*, Section 45, Rail and Water Traffic; and *Barnes on Interstate Transportation*, 2nd Ed., Secs. 48, 57; *Drinker on Interstate Commerce Act*, Section 42, Rail and Water Traffic.

And in Section 116 of Roberts, the author says:

"So long as the rail and water lines are each operated under a separate and distinct control, each making its own rates and billing for the carriage and delivery of the goods solely to the end of its own line, the Act does not apply to water carriers. * * * The receipt successively by the rail and water carriers for transportation of traffic shipped under through bills for continuous carriage over their lines is an assent to a common arrangement for such continuous transportation."

"Common arrangement" referred to in the Act clearly refers to an arrangement between the rail and water carrier and not arrangements between the shipper and either carrier. *Roberts*, Section 116.

C.

ANSWERING THE GOVERNMENT'S PRESENT CONTENTION

(1) THERE WAS NO THROUGH BILL OF LADING OR COMMON ARRANGEMENT FOR THROUGH SHIPMENT IN ANY FORM

As above pointed out, the Government's brief *assumes* that the evidence shows that the traffic in question involved—

(a) continuous shipment,

(b) not requiring intervention by the shipper at Baltimore.

(c) that the notation on the rail bill of lading made possible a through shipment.

We dispute the proposition that the evidence justifies a finding of these facts. On the contrary we contend that the uncontradicted evidence shows that they did not exist in this case. As to a "continuous shipment", assuming that it was such in the physical sense of an uninterrupted journey from an inland point to a Florida port, it was nevertheless not a continuous shipment in the sense of the statute, which requires that both rail and water carriage must be used under a common arrangement for a continuous shipment. We have above discussed this phase of the case and will not repeat the argument on this point.

We have also pointed out specifically that the shipper in this case is obliged to intervene at Baltimore by giving directions to the Munson Line for further

carriage of the goods. The evidence is uncontradicted that such intervention by the shipper is required in the case of every shipment by the Munson Line. The exhibits filed by the Government in the illustrative cases of traffic show this intervention by the shipper by his instructions to the Munson Line as authority and directions for further carriage of the goods. (See Record, p. 131, being letter of instructions from Charles C. Fisher [shipper] to Munson Line; Record, p. 147, being similar letter of instructions from Lancaster Iron Works as shipper; Record, p. 159, being letter of instructions from the Studebaker Corporation as shipper; Record, p. 183, being letter of instructions from My Own Company as shipper.)

The argument of the Government seems to be that it might be possible for this class of transportation to be conducted without the intervention of the shipper at Baltimore and, therefore, the case must be judged as if there were no such intervention. But this assumption ignores the uncontradicted evidence that such intervention is uniformly required by the Munson Line with respect to its traffic to Florida ports. And the case, we submit, must be decided on the facts that exist and not assumptions contrary to the facts.

What the Munson Line does for the shipper in this respect is to maintain for him an agency in Baltimore to take delivery from the rail carriers and to reship over its line in accordance with his instructions given in each individual case. It is certainly not for-

bidden by law to the Munson Line to so act as agent for the shipper at Baltimore. And there is certainly nothing in the Interstate Commerce Act to forbid the shipper to use the mail or telephone or telegraph to advise his agents in Baltimore what to do with the shipment. His personal presence in Baltimore is certainly immaterial. The shipper is clearly entitled to avail himself of modern conveniences of the mail, telephone or telegraph in dealing with the Munson Line. His instructions so given to his agent at Baltimore are the same in legal effect as if he personally appeared in Baltimore and received the goods from the rail carrier and then delivered them to the Munson Line. It is not reasonable to suppose that there is any public interest involved in requiring the shipper to be put to the inconvenience of coming personally to Baltimore to accomplish the delivery to the Munson Line.

In the District Court the Government contended that the traffic transportation documents in this case showed a through bill of lading. This contention, we understand, has now been abandoned in form but is sought to be maintained in substance in the contention that there was made possible a *through shipment.*

The argument of the Government on this point seems to be based on the notation in the body of the rail bill of lading under the caption "description of articles, special marks and exceptions" which, for illustration in the exhibits (Record, p. 19), reads as follows:

"(For Charles C. Fisher, Miami, Florida)"

But the evidence is uncontradicted that this notation *has no force or effect to make possible a through shipment*. It does not of itself effect or cause a carriage of the goods beyond Baltimore, because, as just pointed out, the goods would stop at Baltimore and not move forward on the Munson Line without separate and express instructions from the shipper. The purpose and effect of the notation in the rail bill of lading is for the convenience of the rail carrier and incidentally of the shipper to indicate to the rail carrier where in Baltimore to make delivery of the goods. The purpose and function of this notation is fully explained by Mr. Couse, of the Baltimore and Ohio Railroad, to whose testimony on this point we have previously referred (Record, p. 68).

This notation in the rail bill is not the place of *destination* under the rail bill, nor does it operate to extend the coverage of the rail bill of lading to the water journey. Indeed it does not state how the goods are to be carried from Baltimore to Miami, Florida, whether by rail or by water. Similar notations on bills of lading are not unusual. They are primarily for the convenience of the railroad company in accomplishing the carriage and for convenience of the shipper and consignee or their agents in identifying the goods.

The rail bills of lading in this case are in the form

of the uniform bill of lading, now a well known commercial transportation document prescribed or approved by the Interstate Commerce Commission in accordance with statute. Looking at any of the rail bills of lading in this record we find that the destination of the shipment is clearly stated to be Baltimore, Maryland. As a matter of legal construction of this document, it is entirely apparent that when the goods are delivered at Baltimore to the consignee named, the contract by the rail carrier has been fully and completely executed and there could be no further possible liability of the rail carrier on this document. If, as is often the case, the rail bill of lading is an order bill of lading it must be physically surrendered to the rail carrier upon delivery of the goods. If it is a straight bill of lading it does not have to be surrendered but is executed and accomplished by the delivery at Baltimore. The simple test of whether this bill of lading has any force and effect after delivery of the goods at Baltimore can be found in a claim that might arise by damage to the shipment during the water carriage. If the rail bill of lading were a through bill of lading the rail carrier under the Carmack amendment as the initial carrier would be liable for the damage occurring on the water journey. But obviously this cannot be the case under a rail bill of lading in which the destination is clearly stated to be Baltimore and which, in the case of an "order" bill of lading, is physically surrendered at Baltimore.

As already noted, there are real differences both in law and in business between one through bill of lading from an inland point through Baltimore to Florida ports, and two separate bills of lading, one by rail to Baltimore and one marine from Baltimore. The legal difference is that the latter are separate and distinct contracts with separate coverages. The shipment moves to Baltimore and is subject only to the terms of the rail bill of lading. It moves from Baltimore subject only to the marine bill of lading. In the financial sense the through bill of lading is more valuable to the shipper because he can often discount a draft on the consignee with a through bill of lading attached. This he cannot do where the journey is legally broken at Baltimore and separate bills of lading are issued for the two separate stages of the whole journey. The shipper may also incur a fire risk to the goods in Baltimore after the expiration of the "free time" stated in the rail bill of lading.

We submit, therefore, that there are real and substantial differences, and not merely formal differences, involved in the consideration that there is no through bill of lading in this case. And the existence of this substantial difference has an important bearing on the ultimate question as to whether both rail and water carriers are here used under a common arrangement for a continuous shipment. As neither carrier participates in any way in either the profits or obligations of the other's bill of lading, it certainly must be

that there is no common arrangement between the carriers for a continuous carriage for the whole journey.

The effect of this kind of a notation on the rail bill of lading (to which the water carrier is in no way a party) was considered in the opinion of Examiner Hurley of the Interstate Commerce Commission in Case No. 20306, before the Interstate Commerce Commission, entitled "*Baltimore Association of Commerce et al. vs. American Hawaiian Steamship Company et al.*, already referred to and quoted from in the opinion by Judge Parker in the Circuit Court of Appeals. That case involved consideration of "intercoastal" traffic where the transportation practice was identical with that of "coastwise traffic" in this case. That is to say, the interchange of the goods from the rail to the water carrier was under similar circumstances. The transportation practice is stated at length by Examiner Hurley and will be seen to be exactly similar to that involved in this case. In part the description is as follows:

> "All shipments, generally speaking, are originally consigned to a steamship company or to a consignee in care of the steamship company serving the North Atlantic port. There is usually an indication in the bill of lading that the 'notify' party is the steamship company. * * * In the majority of cases the bills of lading show in the body or descriptive portion thereof, a destination on the Pacific Coast."

In recommending a dismissal of the complaint on the ground that there was no jurisdiction because there was no common arrangement between the rail and water carrier the Examiner said:

> "The railroad bills of lading govern only the movement from the inland point of origin to the North Atlantic ports. This traffic, insofar as the rail carriers are concerned, moves to the North Atlantic port in exactly the same manner as does traffic destined for local consumption at the ports or for export. * * * The transportation service of the rail carriers and their contract of carriage terminates with delivery of the traffic on the pier into the custody of the consignee or his agent, usually the steamship company. They have no further interest in it. With the issuance of the new bill of lading the duty of transporting to the Pacific Coast port and the responsibility for that carriage rests entirely upon the water carrier. It is treated by the steamship company as a new shipment, from port to port, and it recognizes no relationship, contractual or otherwise, with the rail carrier. * * * *The indication of a Pacific Coast port in the descriptive portion, or body, of the railroad bill of lading is but incidental and of no binding force or effect with respect to the contract of carriage.* * * * In accepting the shipment from the rail carrier and in advancing the rail charges at the North Atlantic port the steamship company obviously is acting as agent for the Pacific Coast consignee. The relationship between the steamship company

> and the railroad cannot be said to be different than that between the railroad carriers and agents of other consignees. * * * The method of handling the traffic under consideration, although indicative of an arrangement for its prompt and efficient interchange, is lacking in the essentials necessary to constitute a 'common arrangement' between the rail and water carriers. On the contrary it clearly indicates their independence." (Italics supplied.)

An agreement for carriage beyond its own lines will not be inferred against a carrier from doubtful expressions or loose language but only from clear and satisfactory evidence. *Michigan Central Ry. Co. vs. Myrick*, 107 U. S. 102; *The Thomas McManus*, 24 Fed. 509; *Taylor vs. Maine Central Railroad*, 87 Me. 299; *Herring vs. Chesapeake R. R.*, 101 Va. 778; *McConnell vs. Norfolk*, 86 Va. 248.

The Government's statement of the "question presented" also assumes as a factor in the case that "the railroads connecting with the water carrier "cooperate" with it in informing shippers as to the notations on the railroad bills of lading." Cooperation is, of course, not synonymous with common arrangement —it is a much looser term. But even if it were synonymous, it certainly does not constitute a common arrangement between rail and water carrier whereby both are used for a continuous shipment. And the cooperation referred to relates merely to the

facilitation of delivery of the goods from the rail carrier to the water carrier as agent for the shipper and not for a continuous journey by virtue of the rail bill of lading or any arrangement or agreement between the carriers. But we seriously doubt if the facts referred to as cooperation are properly so described in this case. What the Government here refers to are the circulars issued to prospective shippers by the rail carriers soliciting business for rail carriage to Baltimore for their own respective charges and, therefore, for their own individual benefit. It is true they are soliciting a class of traffic which is ultimately intended by the shipper to go on by water carriage from Baltimore to Florida ports. And in order to obtain this class of business the rail carriers point out to the shipper how delivery of the goods at Baltimore may be facilitated. This is not primarily cooperation between the carriers but rather cooperation between the rail carrier and the shipper. To the extent that the water carrier is included at all in the cooperation, it is only as agent for the shipper. It is, therefore, we think, a rather strained use of the term cooperation to apply it to the facts of this case as denoting cooperation *between the carriers.*

(2) BAER BROTHERS VS. DENVER AND R. G. R. R. CO., 233 U. S. 479, DISTINGUISHED

In the Circuit Court of Appeals, the Government relied on the cases of *Baer Brothers vs. Denver R. G. R. R. Co.*, 233 U. S. 479; *B. & O. S. W. R. R. vs.*

Settle, 260 U. S. 166, 171; *Southern Pacific Terminal Co. vs. I. C. C.*, 219 U. S. 498, 527, and *Texas and N. O. R. R. Co. vs. Sabine Tram Co.*, 227 U. S. 111; of which the Baer Brothers' case is now principally stressed.

None of these cases involved an inquiry under Section 1 of the Act as to a common arrangement between a rail and water carrier, but dealt with railroads only. The crucial issue in each case was whether the rail carrier was subject to the jurisdiction of the Commission by reason of the *interstate character* of the shipment. For instance in *B. & O. vs. Settle*, 260 U. S. 166, the shipper was endeavoring to escape a joint through rail rate by combining two separate rates smaller in the aggregate and it was held that his intention as to ultimate destination was controlling as to the character of the shipment, otherwise he would be able to defeat the purposes of the Commission in establishing the through rate and thus obtain an unfair advantage.

While the *intention of the shipper* as to ultimate destination is important and may be conclusive on the issue of whether a shipment is intra-state or interstate, it is obvious, we submit, that the intention of the shipper is immaterial with respect to rail and water carriage in the absence of a common arrangement between the rail and water carriers. The question in this case is not whether the shipper intended that the

shipment should go on by rail and water carriage to ultimate destination but whether in respect to carriage the rail and water carriers have agreed and arranged between themselves to use both their lines for a continuous carriage.

The question in this case is not whether the goods transported were interstate commerce—which is a different and wider question. The difference is, we think, obvious but is well illustrated by cases arising under the "safety appliance act". For instance, compare the conflicting decisions of the Sixth Circuit Court of Appeals in *United States vs. Geddes,* 131 Fed. Rep. 452, with that of the Circuit Court of Appeals for the Eighth Circuit in *United States vs. Colorado and N. W. R. Co.*, 157 Fed. 321, and that of the Ninth Circuit in *Pacific Coast Railway Co. vs. United States*, 173 Fed. Rep. 448. In the Geddes case the Court took the view that the railroad company (which operated its road wholly within the confines of a particular State) was not subject to the safety appliance act because not engaged in interstate commerce, unless the railroad had entered into some common arrangement with an interstate carrier. But in the contrasted cases the other courts took the view that the question of what constituted interstate commerce was a wider and broader question than merely whether the local road was operating with respect to the traffic involved under a common arrangement with an interstate carrier, that is to say, inter-

state commerce was broader than the classification of carriers as given by Section 1 of the Interstate Commerce Act. And in these latter cases the courts, therefore, held that a purely intrastate rail carrier participating in the movement of interstate commerce, although not under any common arrangement with the interstate connecting carrier was subject to the "safety appliance" act.

The Government especially stresses the alleged applicability to this case of *Baer Brothers vs. Denver R. G. R. R. Co.*, 233 U. S. 479. *This case is clearly distinguishable on the facts.* In the Baer case the railroad was sued by the shipper to recover a refund (of excessive rates) ordered by the Commission. It defended on the ground that it was not subject to the jurisdiction of the Commission because only an intrastate carrier. It was held liable because it had participated in a through interstate shipment with another interstate carrier without technically a through bill of lading but with a *conventional division of an entire freight charge, made and collected by the initial carrier.* The facts (p. 480) showed that the initial carrier at St. Louis, Missouri, had given receipts to the shipper for the goods—"in good order to be delivered to the Baer Brothers Company at Leadville, Colorado (the ultimate destination), via the Denver and Rio Grande". This Court held the long continued course of dealing between the two carriers and the division of the freight, with the knowledge that it had

been paid *as compensation for the single haul* made the intrastate carrier subject to the jurisdiction of the Commission.

The Court indicates that if the intrastate carrier had received the goods independently of any existing arrangement with the other rail carriers a different question would have been presented. The dominant differences on the facts, comparing the Baer case and the case at bar, are as follows:

In the Baer case the shipper dealt only with the initial rail carrier. In the Munson Line case the shipper is obliged to make two separate contracts, one with the rail carrier and one with the Respondent water carrier.

In the Baer case connecting rail carriers made a conventional division of a single freight payment made as compensation for the whole journey. In the Munson Line case the shipper or consignee makes payment to the Munson Line of the amount it has disbursed for his account to the rail carrier plus, separately stated, its own charge for the water carriage.

In the Baer case the shipper at no time intervened at the connecting point between the two carriers to direct or control the further carriage of the goods. In the Munson Line case the shipper is required in every case to separately make his arrangement with the water carrier for further carriage.

In the Baer case the intrastate carrier never issued its own bill of lading to the shipper. In the Munson Line case a separate marine bill of lading is always issued to the shipper.

In the Baer case the shipment moved forward on a continuous rail journey from point of origin to point of ultimate destination by force of arrangement between the shipper and the initial carrier which necessitated in turn some arrangement between the carriers themselves. But in the Munson Line case a shipment does not go forward from the connecting point by virtue of any arrangement between the carriers but by a separate arrangement made by the shipper.

In the Baer case the dominant issue was whether the carrier was subject to the Act by engaging in interstate commerce. It is true the facts there found were also referred to as constituting a common arrangement between the rail carriers. The case was decided in 1913, long after the passage of the Hepburn Act. Apparently the railroad transportation practice involved extended over a period prior and subsequent to the passage of the Hepburn Act. After the passage of the Hepburn Act the jurisdiction of the Commission was dependent not upon the existence of a common arrangement between the rail carriers but only on whether there was interstate commerce. It may therefore be questioned whether the Court in using the expression "common arrangement" in the opin-

ion was applying the phrase in its statutory sense as applicable to rail carriers prior to the Hepburn Act.

But assuming (for sake of argument only) that the facts incidentally called a "common arrangement" in the Baer case would constitute a "common arrangement" within the issue in the instant case, it is sufficient that in the instant case (as both courts below have found) the facts so characterized in the Baer case are lacking.

In the Baer case the Court said on the facts there appearing:

> "That there was a common arrangement between the two carriers here was shown by the long-continued course in dealing, and *the division of the freight, with the knowledge that it had been paid as compensation for the single haul.*" (Italics supplied.) (233 U. S. 491.)

In the instant case

> "there is *no* agreement between defendant and the rail carriers for the division of the aggregate of the separate rail and water rates, *or any customary or conventional division thereof.* * * * Defendant receives the freight at Baltimore as agent of shipper and pays the rail charges. It then issues a bill of lading to the shipper covering the water transportation. Upon delivery in Florida, it collects from the consignee its own charges as well as the rail charges which it has advanced; but the latter are collected, not as

agent for, or under any agreement with, the rail carrier, but because they have been advanced as an incident to the contract between defendant and the shipper.". (Italics supplied.) (Record, p. 194, 37 Fed. [2d] 681-682.)

In a word, this Court in the Baer case said that certain specific facts showed a "common arrangement"; in the instant case *those facts* are lacking, and both courts below hold that *different facts* do *not* show a "common arrangement".

The Baer case has been frequently cited on the proposition as to what constitutes interstate commerce but so far as we have been able to find it has never been cited on the point as to what constitutes a "common arrangement". See, for instance, *Atlantic Coast Line R. R. Co. vs. Standard Oil Co.*, 275 U. S. 268; *United States Feldspar Corp. vs. United States*, 38 Fed. (2nd) 94 (District Court of New York); *Ingalls vs. Maine Central R. R.*, 24 Fed. (2nd) 113, 115 (District Court of Maine); *Missouri K. & T. R. vs. Northern Okla. Rys.*, 25 Fed. (2nd) 689, 697 (C. C. A. 8th); *Erie R. Co. vs. United States*, 32 Fed. (2nd) 613, 614 (D. C. N. J.); *B. & O. S. W. Ry. vs. Settle*, 260 U. S. 166, 170; *Phila. & R. Ry. Co. vs. Hancock*, 253 U. S. 284, 286.

There is also to be noted a distinction between cases dealing wholly with railroads and cases dealing with rail and water carriers with respect to what facts may constitute a common arrangement. By reason of the

intrinsic differences in the subject matter of connecting rail carriers and interchange of freight between rail and water carriers, it does not necessarily follow that facts which might be sufficient to show a common arrangement by connecting rail carriers would necessarily justify finding of such an arrangement between rail and water carriers. That is to say, the implication of a common arrangement could, by reason of the nature of rail carriage, be more readily inferred than in the case of separate rail and water carriers. This distinction has been pointed out by the Circuit Court of Appeals for the Third Circuit and also for the Second Circuit in finding against a common arrangement between rail and water carriers and distinguishing the case from the language of this Court in *Cin., N. O. and Tex. Pac. Ry. Co. vs. Interstate Commerce Commission*, 162 U. S. 184, a case dealing with connecting rail carriers only. *Camden Iron Works vs. United States*, 158 Fed. Rep. 561; and *Mutual Transit Co. vs. United States*, 178 Fed. Rep. 664, 668.

CONCLUSION

We submit that the discussion of the facts and law shows that there was no error in the action of the District Court in instructing a verdict for the Respondent on the grounds that there was (a) no sufficient evidence of a "common arrangement" and (b) that the uncontradicted evidence really established the con-

trary. It seems needless to discuss other alleged errors assigned in the Court of Appeals but no longer pressed by the Government.

We respectfully pray an affirmance of the judgment of the Circuit Court of Appeals.

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